# STATE OF MICHIGAN

# COURT OF APPEALS

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CECILIA O. ONYEBUCHI and JAMESON ONYEBUCHI,

Plaintiffs-Appellants,

v

MARY EALEY, MIKE NORDSTRAND, SPECTRUM COMMUNITY SERVICES, INC., SPECTRUM HUMAN SERVICES, INC., and CAROLYN GENE McCALL,

Defendants-Appellants.

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UNPUBLISHED
July 29, 2003

No. 235296
Washtenaw Circuit Court
LC No. 98-009887-CL

Before: Whitbeck, C.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's dismissal of plaintiffs' case as a sanction for discovery abuses and the court's earlier grant of defendants' motion for summary disposition of plaintiffs' claims of retaliation, wrongful discharge, gross negligence, and intentional infliction of emotional distress. We affirm.

I

This case arises following a physical altercation between plaintiff Cecilia Onyebuchi[1] and a coworker, defendant Carolyn Gene McCall, at a residential home for persons with developmental disabilities. The home is operated by defendant Spectrum,[2] which employed plaintiff and McCall as well as defendants Mary Ealey and Mike Nordstrand. Ealey was plaintiff's immediate supervisor and Nordstrand was a manager.

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[1] For ease of reference, this opinion refers throughout to plaintiff Cecilia Onyebuchi as plaintiff and to defendants collectively, without distinguishing with respect to particular defendants or their respective counsel.

[2] Defendants Spectrum Human Services, Inc. and Spectrum Community Services, Inc. are affiliate organizations. The record is unclear regarding the legal context of each particular organization, and for purposes of this opinion, we merely refer generally to Spectrum.

Plaintiff was hired in January 1996 as a residential program worker for Spectrum. On the morning of November 22, 1997, plaintiff was working at the Bateson home in Ann Arbor, when McCall arrived around 8:00 a.m. to dispense medications to Bateson consumers.[3] A dispute arose between plaintiff and McCall concerning the application of topical ointment on one of the consumers. A verbal altercation ensued, which progressed into a physical fight between the two in the kitchen of the home. The home supervisor intervened in the fight and separated the two; however, moments later, the fight resumed in the garage of the home, with a mop pail and other items allegedly being thrown. At one point, McCall began hitting plaintiff with a piece of metal pipe. Plaintiff sustained injuries and was transported by ambulance to the hospital for treatment. She suffered several lacerations requiring stitches and a broken rib.

Following an internal investigation, plaintiff's employment was terminated, effective December 26, 1997. McCall's employment was also terminated. Plaintiff and her husband filed this lawsuit, alleging various claims: racial discrimination based on national origin (Count I), retaliation for complaints of sexual harassment (Count II), wrongful discharge (Count III), gross negligence (Count IV), intentional infliction of emotional distress (Count V), assault and battery (Count VI),[4] and loss of consortium (Count VII).

The circuit court granted summary disposition in favor of defendants[5] with regard to Counts II, III, IV, and V. However, the court denied summary disposition of Count I, discrimination.[6] After jury selection, the case was assigned for trial before a district court judge. On the third day of trial, November 16, 2000, following an emotional outburst by plaintiff in the presence of the jury, the trial court declared a mistrial. The court subsequently held a hearing to take testimony concerning alleged discovery abuses by plaintiff, which were raised at the outset of trial, but reserved for later decision. The court thereafter granted defendants' motion for dismissal of plaintiffs' case as a sanction for discovery abuses.

III

Plaintiffs first claim that the circuit court erred in assigning this case to the district court for trial after jury selection. Plaintiffs argue that because this is an employment-related civil rights action under the Civil Rights Act (CRA),[7] venue is proper in the county where the alleged violation occurred pursuant to MCL 37.2801(2), and plaintiffs were entitled to a jury trial in circuit court, *Barbour v Dep't of Social Services*, 172 Mich App 275; 431 NW2d 482 (1988).

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[3] Clients residing in the home.

[4] This count pertained to only defendant McCall.

[5] The motion for summary disposition was filed by all defendants except McCall, who initially proceeded in propria persona and later was represented by separate counsel.

[6] Count VI, assault and battery was not included in the motion for summary disposition. The court noted that because Count VII, loss of consortium, was a derivative claim, it remained with respect to the remaining counts.

[7] MCL 37.2101 *et seq.*

Thus, plaintiff argues the reassignment to district court is contrary to state statute and subjected plaintiffs to a forum they did not select, local influences, and a trial without the expertise of a circuit court judge.

This issue is not preserved for appeal because plaintiffs failed to raise the issue before the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). This issue is also abandoned because plaintiff has failed to properly argue the merits of the issue.[8] *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). This case was filed in Washtenaw County and assigned to be tried by a district court judge, sitting as a judge in the unified trial court of Washtenaw County. The case was tried before a jury. Plaintiffs have failed to show how this assignment violated MCL 37.2801(2) or abridged their right to a jury trial, *Barbour, supra*, nor have plaintiffs cited authority to support their contentions. The CRA venue provision, MCL 37.2801(2), merely provides that an action "may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business." MCL 37.2801(2); *Barnes v Int'l Business Machines Corp*, 212 Mich App 223, 225; 537 NW2d 265 (1995).

An appellant may not merely assert an error and leave it to this Court to search for authority to sustain or reject his position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Yee, supra* at 406. Nor may a party give issues cursory treatment with little or no citation of supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

As defendants argue, the fact that a district court judge was assigned to preside over plaintiffs' trial, in and of itself, is not a basis of error under Michigan law. See *People v Fleming*, 185 Mich App 270, 273-278; 460 NW2d 602 (1990) (discussing claimed error where a Recorder's Court judge presided over the trial for an offense committed in Wayne County, but outside the corporate limits of the City of Detroit); see also *Zachrich v Booth Newspapers*, 119 Mich App 72, 74-75; 325 NW2d 630 (1982) (discussing the assignment of a district court judge from another county to preside over trial in a circuit court case). Plaintiffs concede that the district court judge was, in effect, sitting as a circuit court judge. Their claim that they were improperly denied a trial in Washtenaw Circuit Court is without merit.

III

Plaintiffs claim that the court erred in dismissing plaintiffs' claims as a sanction for discovery abuses, MCR 2.313(B)(2)(c). Plaintiffs argue that the sanction of dismissal was too harsh and improper because no discovery orders had been issued and plaintiffs cooperated in discovery. Plaintiffs also argue that the sanction precluding plaintiffs from calling any medical witness or admitting any medical records was too harsh. We disagree.

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[8] Further, plaintiffs have failed to properly present their issues for appeal because they provide no statement of the applicable standards of review. MCR 7.212(C)(7).

This Court reviews a trial court's imposition of discovery sanctions for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). Whether a trial court has the authority to impose particular sanctions is a question of law subject to review de novo. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 637; 607 NW2d 100 (1999). This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C), *Traxler v Ford* Motor Co, 227 Mich App 276, 282; 576 NW2d 398 (1998). Regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C). A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made. *Traxler, supra* at 282.

A

The trial court properly exercised its discretion in excluding the medical testimony and records as a sanction for discovery abuses. A court may "order such sanctions as are just." MCR 2.313(B)(2). Pursuant to MCR 2.313(B)(2)(b), sanctions may include "prohibiting the party from introducing designated matters into evidence." The court gave full consideration to the circumstances and the evidence and imposed the sanctions accordingly. *Bass, supra* at 26.

Plaintiffs' claim for damages was premised in large part on plaintiff's mental and physical condition. Plaintiff allegedly suffered with post-concussive headaches, severe anxiety, depression and severe emotional distress as a result of the assault and events at work. She also allegedly suffered with paranoia, suicidal ideation, memory loss, loss of concentration, blurred vision, headaches, continuous upper body pain, neck stiffness, hair loss, nightmares and insomnia. Plaintiff's medical condition was also a factor in her husband's loss of consortium claim.

The issue of discovery abuses arose on the day before trial when defendants' counsel orally moved to strike certain witnesses that were not on or were improperly named on plaintiffs' witness list. After hearing from counsel and considering the circumstances, the court ruled that plaintiffs were precluded from presenting the testimony of three doctors who were not named on the witness list because the defense had no opportunity to depose the doctors or timely acquire information from them to prepare for trial. Under these circumstances, the court's sanction was a proper exercise of discretion.

After the court's ruling on the medical testimony, a question arose whether medical records from two doctors named on plaintiffs' witness list would be admissible. Plaintiffs' counsel represented that he had provided the records to defendants at three points: in response to interrogatories, in his trial exhibit package, and by his clients signing the Records Deposition Service, Inc. (RDS)[9] authorizations for release of medical records. After further discussion and indications that 1) plaintiffs had failed to provide authorizations for the release of medical records during discovery, and 2) that plaintiffs' counsel had instead purportedly obtained the records himself from the doctors and sent them to defendants, but that defendants had not received the medical records, the trial court tentatively ruled that plaintiffs were precluded from

[9] Defendants employed a private records service to transmit discovery requests.

presenting the medical records. However, the court allowed counsel an opportunity to review his file and produce documentation that the records were forwarded to defendants.

After continued discussion of the discovery issues on the morning of trial, the court reiterated its previous rulings. The court stated that overnight it had reviewed the entire file, and the file indicated, as defense counsel stated, that plaintiffs had provided defendants only a one-page summary letter from Dr. Anderson in response to discovery requests.[10] Recognizing that MCR 2.313 permitted a number of options for a party's failure to provide discovery, the court concluded that the sanction of excluding the medical records was appropriate.

The court properly exercised its discretion. The sanction is supported by the court's findings. The court found that rather than follow the third-party records service procedure for ensuring that all requested records were transmitted and recorded, plaintiffs chose to follow their own method and that method did not produce the records for defendants in a timely manner prior to trial. These findings are not clearly erroneous. *Traxler, supra* at 282.

Our review of the record shows that defense counsel provided the court the affidavit of an RDS employee, averring that RDS sought release authorizations from plaintiffs' counsel in writing each month over a nine-month period, April through December 1999, but was unable to secure plaintiffs' authorization. Plaintiffs' counsel informed the court that he had obtained the authorizations from his clients, obtained the records himself, and then turned them over to defense counsel. Plaintiff's counsel stated that he did not respond to the RDS requests for authorizations because he had already provided the records in July 1999. We recognize that on the second day of trial, plaintiffs' counsel changed his position, stating that after a detailed review of his file, he found that his client had signed an authorization in April 1999 for RDS to obtain medical records from Dr. Anderson. Further, counsel stated that he had telephone conversations with RDS and was assured that they had the records, and, at the time, did not understand why he continued to receive the notices from RDS. Nonetheless, the court's findings are not clearly erroneous. We are not left with the definite and firm conviction that a mistake has been made. *Traxler, supra* at 282.

B

The trial court properly exercised its discretion dismissing the case. A trial court may impose the sanction of dismissal for discovery abuse. *Bass, supra* at 26; *Traxler, supra at* 286, 288. Further, a trial court has inherent authority to sanction a party for failing to preserve evidence or to dismiss a lawsuit as a sanction for litigant misconduct. *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 211; 659 NW2d 684 (2003); *Persichini, supra* at 639-640.

[10] Defense counsel stated that the summary letter was attached to plaintiffs' response to an unrelated request for production of documents.

The trial court properly imposed the sanction of dismissal only after conducting an evidentiary hearing and again reviewing the circumstances and evidence. *Bass, supra* at 26; *Traxler, supra* at 288. The court's sanction is supported by its findings.

Dismissal was based on the court's conclusion that plaintiffs had provided defendants altered medical records in plaintiffs' trial exhibit package, which was an egregious violation of discovery that could not be cured. The court found that the doctors did not alter the medical records, that their files contained no altered records, and that they had clear rules and procedures for safeguarding such records as well as for the copying and transmittal of the records. The court attributed the alteration of the medical records to plaintiffs. The court found that plaintiffs, their counsel, or someone under their control altered the records, and regardless of who altered them, it was the responsibility of plaintiffs' counsel to review documents sent out under his name.

The court's findings are not clearly erroneous. Plaintiffs' counsel maintained that he had received the altered medical records directly from the doctors, either Dr. Anderson or Dr. Grampie. The court conducted a hearing January 29, 2001 to obtain testimony from Dr. Anderson and Dr. Grampie concerning plaintiff's medical records and the doctors' record keeping procedures. Contrary to plaintiffs' assertion on appeal, the evidence at the January 29, 2001 hearing did not indicate that someone under the doctors' control altered the medical records in the normal conduct of its business. Plaintiffs point to no specific testimony or documentary evidence to support their assertion, and we find none. Further, plaintiffs' complaint that the court attached no blame to the medical center for sending altered records is unfounded because plaintiffs point to no evidence to support such a conclusion.

Both doctors testified that they had received requests for plaintiff's medical records on April 19, 1999 from plaintiffs' counsel and copies were sent to him. Dr. Anderson testified that his file contained a subpoena from defense counsel, dated November 6, 2000. Both doctors testified that they were not aware of any alterations to the medical records at issue, and would not have authorized such alterations, and it would not be typical for their office personnel to make such alterations on medical records.

Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply is accidental or involuntary. *Bass, supra* at 26. Although plaintiffs assert that there was a mix-up in the medical authorizations sought by the document retrieval agent acting on behalf of defendants, and any discovery violation was not willful, we find no clear error in the court's finding to the contrary. Given the history of discovery in this case, the sanctions discussed, *supra*, and the serious nature of the violations, the trial court did not abuse its discretion imposing a sanction of dismissal.

IV

Plaintiffs claim that the trial judge erred in failing to recuse himself from the case after plaintiffs' counsel notified the judge that he had filed a grievance with the Michigan Judicial Tenure Commission concerning the judge's conduct in this case. Plaintiffs assert that the trial court's dismissal was retaliatory and there is an appearance of personal bias.

A complaint to the Judicial Tenure Commission in and of itself does not require disqualification of a trial judge. *Ireland v Smith*, 214 Mich App 235, 249; 542 NW2d 344 (1995), mod 451 Mich 457 (1996). To justify disqualification of a judge, a party must generally show actual bias, or the likelihood or appearance of bias to the extent that it affects the judge's ability to hold the balance between vindicating the interests of the court and the party. MCR 2.003(B)(1); *Cain v Dept of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996); *Ireland, supra* at 250. No such circumstances have been shown in this case.

V

Plaintiffs claim that the court erred in finding that there were no genuine issues of material fact and granting summary disposition on counts II through V. This issue is moot in light of our above finding that the sanction of dismissal was not an abuse of discretion.

Affirmed.

/s/ William C. Whitbeck
/s/ Janet T. Neff
/s/ Pat M. Donofrio